

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 TIMOTHY S. GAGNON, . Civil Action
5 VS. . No. 07-1767
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9 . CORRECTED VERSION
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11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE KENNETH M. HOYT
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 FOR PLAINTIFF:

16 MS. JO MILLER
17 Law Office of Jo Miller, PC
18 505 N. Main
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20 Conroe, Texas 77301

21 FOR DEFENDANT WING:

22 MR. STEPHEN W. SCHUELER
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 APPEARANCES (Continued):

2
3 FOR DEFENDANT
4 UNITED TECHNISOURCE and
AIS:

5 MR. ROBERT G. CHADWICK, JR.
6 Campbell & Chadwick, PC
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Suite 1250
Dallas, Texas 75244

8 ALSO PRESENT:

Mr. Timothy S. Gagnon

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11
12 OFFICIAL COURT REPORTER: MS. STEPHANIE KAY CARLISLE
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1 P R O C E E D I N G S

2 (October 21, 2010)

3 THE COURT: All right. Good morning, again. We'll
4 start with Cause No. 2007-1767, Gagnon versus Wing Aviation,
09:06:01AM 5 LLC, United Transource -- Technisource, I'm sorry, and AIS
6 Tech Services.

7 Who is here in behalf of the plaintiff?

8 MS. MILLER: Jo Miller, Your Honor, in behalf of
9 Tim Gagnon. And Mr. Gagnon is here with me today.

09:06:22AM 10 THE COURT: Very good.

11 And representing Wing Aviation, LLC?

12 MR. SCHUELER: Steve Schueler, Your Honor.

13 THE COURT: And United Technisource?

14 MR. CHADWICK: Robert Chadwick, also representing
09:06:37AM 15 AIS Tech Services.

16 THE COURT: All right. Very good.

17 All right. Ladies and gentlemen, I think we
18 have moved, I guess, down the field a bit. We at least know
19 what the bottom line is. We just can't agree upon what that
09:06:49AM 20 bottom line is. Is that where we are?

21 And let me just say, as a preliminary matter,
22 that the order I entered regarding Wing Aviation, I believe,
23 Inc., for all practical purposes, does not get Wing Aviation,
24 LLC, out of the lawsuit. The question, I gather, raised by
09:07:11AM 25 counsel for Wing Aviation, LLC, is whether or not that should

1 be corrected by now entry of a different or separate order so
2 that the, quote, intentions of the parties, end of quote, is
3 affected.

09:07:35AM 4 So, let me ask whether or not, Ms. Miller,
5 you-all have come to any closer understanding in this matter?

09:07:59AM 6 MS. MILLER: Your Honor, we have not. It is our
7 position and has been from the beginning, except for
8 December 1st when we were here, when initially it was
9 represented that AIS and UTI would be responsible for the
10 attorney fees as well as the damages in The Fair Labor
11 Standards Act case.

12 It became apparent later that day that that was
13 not going to happen. And the Court may or may not recall, but
14 we objected to the entry of the order dismissing Wing
09:08:16AM 15 Aviation, Inc. And we also filed a Motion to Reconsider prior
16 to the close of this case and before it was appealed. So --
17 and at the Fifth Circuit we identified Wing Aviation, LLC, and
18 Wing Aviation, Inc., as interested parties; and we also sent a
19 copy of our Fifth Circuit brief to Wing Aviation.

09:08:41AM 20 So, it is our position that they are in the
21 lawsuit, they are joined employers. That's the purpose of
22 Mr. Gagnon being here today, if the Court needs some testimony
23 to understand the joint employer relationship. And we would
24 ask the Court to proceed with Wing Aviation, LLC, as a
09:08:58AM 25 joint -- as the joint employer with joint and several

1 liability.

2 THE COURT: Well, I'm not sure that we need to go
3 back and remark the road again. The Fifth Circuit has already
4 determined that the funds are due and owing. Apparently, they
09:09:13AM 5 have not been paid. So, let me ask a question regarding
6 another matter.

7 Have you done any post-judgment discovery in
8 this matter to determine what the financial status of AIS and
9 United Technisource might be, whether or not they have the
09:09:31AM 10 funds at all or ever had the funds to pay the judgment in the
11 case?

12 MS. MILLER: Your Honor, I did some post-judgment
13 discovery both to AIS/UTI as well as to Wing Aviation,
14 which -- you know, even if it is not determined that they are
09:09:49AM 15 a party, it's still entitled to post-judgment discovery. Wing
16 Aviation has not responded, but AIS/UTI has responded. They
17 have no assets -- no attachable assets that I can tell from
18 their P&L and from their --

19 THE COURT: Are they shell corporations; or what are
09:10:17AM 20 they, as far as you know?

21 MS. MILLER: Well, I don't believe they're shell
22 corporations. I think there are a number of them that do
23 interchange with each other, and they do that, my
24 interpretation of it, apparently every year to avoid the IRS
09:10:30AM 25 indication that they're not temporary employees.

09:10:50AM

09:11:08AM

1 So, essentially, in Mr. Gagnon's case, UTI was
2 the first entity with whom he contracted. They -- they were
3 replaced -- actually, it was almost a year and a half or more
4 than a year and a half later -- with the exact same structured
5 company, only it was renamed. So, whether or not they're
6 shell companies, there are many of them. They all do the same
7 things. They're all owned by the same people. They all have
8 the same officers. They all have the same phone number. They
9 all have the same address. So -- they just don't own any
10 property that would be attachable, any real property.

11 THE COURT: So, the AIS and UTI companies are simply
12 companies that are used by, for example, Wing Aviation, LLC,
13 as an employer or co-employer or joint employer for purposes
14 of void -- of avoiding direct employment or not?

09:11:31AM

15 MS. MILLER: That would be -- that would be correct,
16 yes. And it would be comparable to a staffing agency.

17 THE COURT: Okay.

18 MS. MILLER: But by the economic control, truly on
19 the day-to-day control of the workers was with Wing Aviation.

09:11:48AM

20 THE COURT: All right. Mr. Chadwick, is that the
21 proper -- somewhat proper description of the role that AIS and
22 UTI play, sort of staffing companies?

23 MR. CHADWICK: Yes, Your Honor. I mean, I would
24 take issue with the fact that they're shell companies.

09:12:03AM

25 THE COURT: Well, that was my question as to whether

09:12:18AM

1 or not they were shell companies. That's what I was asking.
2 And by that I meant -- there is nothing wrong with having
3 shell companies. They are perfectly legal. By that I meant
4 whether or not these companies were true standalone companies
5 or whether they are simply dependent companies on contractual
6 relationships with the mother ship.

09:12:37AM

7 MR. CHADWICK: Okay. No. They are standalone
8 companies that contract with entities like Wing Aviation to
9 provide staffing, in particular, individuals who do
10 maintenance work. So -- but I would also take issue that --
11 you know, to any type of shenanigans to avoid IRS exposure,
12 but -- I could also say that as of December 1st of 2008, you
13 know, the financial condition of AIS Tech Services was much
14 better than it is today.

09:13:01AM

15 THE COURT: Well, but that was a situation that
16 existed -- whatever that financial situation was or at that
17 time, it existed at the time that the -- that the -- I don't
18 want to say the deal; but the way that this lawsuit was
19 resolved, wasn't it?

09:13:25AM

20 In other words, in 2008, the financial
21 situation at the time that the representations were being made
22 to the Court that -- that the matter would be handled by your
23 companies, you had -- you were fully aware -- or your
24 companies were fully aware of the financial situation that
25 those companies were in at that time.

1 MR. CHADWICK: That's correct, Your Honor.

2 THE COURT: Well, here's my concern. If these are
3 temporary staffing agencies, they would have no assets. Say
4 the profits that they would receive from the overhead -- the
09:14:06AM 5 over -- the override or the percentage of staffing, I guess,
6 based upon gross salaries that are charged, they would have
7 some override in that; and that would be the -- that would be
8 the only asset, if anything, they would have. These -- these
9 were not really -- these are not true account receivables.

09:14:29AM 10 These are salaries that are being paid, for example, by Wing
11 Aviation who says: I want to hire ten people, and I will pay
12 you X number of dollars for these ten people. They write the
13 check, and then you divvy up that money with some balance
14 being kept by you -- and I say "you," meaning your
09:14:46AM 15 companies -- as a profit or as a margin for having provided
16 this, quote, service. Isn't that the way these --

17 MR. CHADWICK: That's correct, Your Honor.

18 THE COURT: All right. So, there are no -- in a
19 real sense, you're not really producing or generating
09:15:03AM 20 anything. You are simply doing a service for a corporation
21 that either doesn't want to do it or can't do it.

22 MR. CHADWICK: That's correct.

23 THE COURT: Okay. So, then you would not have a
24 profit margin that's not being divvied up to the owners or to
09:15:24AM 25 the stockholders. And so, the conflict here would be between

1 the judgment that the plaintiff has and the final attorney
2 fees issues that are trying to be resolved. That would fly in
3 the face of the margin that your company expects to receive.
4 So, there's no built-in profit margin for this company.

09:15:58AM 5 MR. SCHUELER: Judge, can I speak for a moment?

6 THE COURT: I want to hear him.

7 MR. CHADWICK: Well, I mean, I think -- you know,
8 just to tell you how the December 1st transpired, I mean,
9 Mr. Schueler came in and said, you know, I want to propose a
09:16:10AM 10 stipulation.

11 And I visited with the client and said: Is
12 this a financial obligation that you can undertake? And the
13 representation at that time was yes. It was a growing
14 company. There was profit. And my understanding is that the
09:16:27AM 15 client was able to pay a judgment at that time. It is just
16 that at this particular time, it is just we're dealing with no
17 profit margin.

18 THE COURT: Well, let me tell you the problem that I
19 have.

20 MR. CHADWICK: Okay.

21 THE COURT: Where there are generally -- and I --
22 the problem in part is this: That in most circumstances where
23 the Court has been faced with this issue -- generally
24 speaking, this comes up in similar cases or Title VII cases
09:16:57AM 25 where you have an employer who goes out and gets a Prostaff or

1 some other company to do its hiring for it and then puts these
2 people in play in another company. Generally, these are
3 considered in law to be joint employers.

4 And what has happened is the parties here --
09:17:19AM 5 apparently, these people like Gagnon and others were doing
6 work -- well, Gagnon, in particular. We don't need to worry
7 about others. They were doing work because Wing Aviation,
8 LLC, needed this service. When Wing Aviation needs a service,
9 it comes to you. You do the contracting of the employer. And
09:17:39AM 10 apparently handles, I gather, all of the taxes?

11 MR. CHADWICK: Correct.

12 THE COURT: All of the withholdings and pay all of
13 the -- I don't know if you have worker's compensation and
14 other kinds of benefits -- quote, benefits -- that employees
09:17:55AM 15 would normally be provided, whether that's being provided by
16 AIS; and I would assume that it is. But you are providing a
17 whole service.

18 When Wing Aviation, LLC, gets Gagnon, they're
19 getting a package deal; and they, at least theoretically,
09:18:17AM 20 would not be responsible for anything that happened to Gagnon.
21 But that's not true as it relates to how that works across the
22 board because if Gagnon were somehow mistreated -- let's say
23 discrimination of some sort, the way he is managed and
24 handled -- he's going to sue your company, but he's also going
09:18:36AM 25 to sue Wing Aviation because the situs for this event is Wing

1 Aviation, LLC's site.

2 So, you have this creation in law by companies
3 to avoid perhaps certain liabilities and certain
4 responsibilities; but you don't always avoid all of the law as
09:19:00AM 5 it relates to the federal law, perhaps. I'm not sure. So,
6 I'm simply asking that because if this is -- if this situation
7 is the way I perceive it to be, AIS and UTI don't really ever
8 have to pay this man because they will never have the money to
9 pay him. The only money they're going to have is money that
09:19:24AM 10 they get from a continuing relationship with the Wing
11 Aviation. They're not getting money -- Wing Aviation,
12 theoretically, isn't giving you a dime for this lawsuit,
13 theoretically.

14 MR. CHADWICK: Right.

09:19:36AM 15 THE COURT: And so, here's the question I have for
16 you: Who is paying your fees?

17 MR. CHADWICK: Well, I could tell you that --

18 THE COURT: I didn't ask you how much. That's the
19 second question. Who is paying your fees?

09:19:50AM 20 MR. CHADWICK: I haven't been paid in quite some
21 time.

22 THE COURT: Well, but I gather the check would come
23 from AIS or UTI.

24 MR. CHADWICK: That's correct.

09:19:59AM 25 THE COURT: All right. And here's my concern: That

1 if the check comes from AIS or UTI, the question is how much
2 time have you put into this case? Just a round figure.

3 MR. CHADWICK: I mean, it's about 130,000.

4 THE COURT: Yeah. You put in more time than this
09:20:18AM 5 case is worth, in terms of the judgment that Gagnon has and
6 the amount of money that the other counsel is receiving. In
7 other words, the amount of money that you have -- the amount
8 of time that you have expended apparently exceeds the amount
9 of time that counsel has expended.

09:20:37AM 10 MR. CHADWICK: And -- but understand that the
11 onstaff time related to claims that were resolved on summary
12 judgment in the defendant's favor which included age
13 discrimination claims under the ADA and claims under the
14 Family Medical Leave Act.

09:20:54AM 15 THE COURT: I understand that. And my primary
16 concern is whether or not the plaintiff in this case, whether
17 or not there's substance to the argument to be made that Wing
18 Aviation has simply danced its way out of this situation,
19 attempted to and failed in the sense of the paperwork but at
09:21:18AM 20 least in spirit and is going to leave you holding the bag and
21 wrestling with counsel about attorney's fees.

22 Why haven't they simply paid Mr. Gagnon
23 already? I mean, these are wages. These are not -- this is
24 not some judgment that finds itself in some major, let's say,
09:21:44AM 25 punitive damages or some -- something that could rile you up.

1 This is actually money out of his pocket that he didn't get
2 paid, right?

3 MR. CHADWICK: My understanding is that there are
4 two reasons why; number one, the financial condition of AIS
09:22:01AM 5 Tech and United Technisource, which is actually worse today
6 than it was back in June when we tried to negotiate the
7 settlement with counsel for the plaintiff. The second issue
8 is something that my office looked into is to what extent
9 would we at least muddy the waters with respect to our
09:22:21AM 10 objections to the attorney's fees by paying off at least part
11 of the judgment.

12 THE COURT: Well, you can't muddy the waters. He's
13 due whether she gets paid or not, whether Ms. Miller gets paid
14 or not.

15 MR. CHADWICK: Right.

16 THE COURT: The Fifth Circuit has already spoken
17 that, and it is over. And what you have running now is a
18 substantial -- potential for penalty and interest against that
19 because there's a penalty for not paying in the first
09:22:45AM 20 instance. And certainly the penalty or interest that would be
21 due on wages unpaid -- I'm not sure. I haven't looked at the
22 statute. It may be just minuscule. I'm not sure. It may be
23 one and a half percent or whatever the Government claims. But
24 it certainly has the potential of being a penalty beyond what
09:23:03AM 25 is actually owed because of the wages.

1 MR. CHADWICK: I understand.

2 THE COURT: Well, Mr. Schueler.

3 MR. SCHUELER: Two things, Your Honor. First, you
4 know, what AIS and United Technisource do is the same thing,
09:23:19AM 5 as you say, Prostaff, Administaff. They're not shell
6 companies, and Wing Aviation is not their only customer.

7 They've got lots and lots of customers. And I think part of
8 the problem is, you know, we have been through the worse
9 recession, at least in my life, over the last year or two.

09:23:35AM 10 So, it is no surprise that companies like AIS and United
11 Technisource have -- their incomes have declined; but they're
12 no different than any other service business, law firms. I
13 mean, we don't have the assets. We've got some desks and
14 computers and books; but if we don't have clients, you know,
09:23:50AM 15 paying fees on a regular basis, we're out of business. The
16 same thing is true with any service company.

17 So, you know, I think the suggestion that there
18 was any sort of scheme or conspiracy is really not even
19 reasonable. None of us could have predicted, as we stood here
09:24:08AM 20 in December of 2008, that this company -- these companies
21 would go into a recession. I'm sure the aircraft business
22 probably gets hurt more than most when things go down. So,
23 their income and revenues and assets have declined; but nobody
24 could have predicted that.

09:24:25AM 25 You know, my real issue is -- and I think --

1 let me also say, even though up until now I didn't think I had
2 a dog in this fight, I think the real issue is not so much the
3 back wages. In fact, I think my client would agree to pay not
4 only the wages but the liquidated damages. We're only talking
09:24:43AM 5 about \$8,000 even with the liquidated damages. I think the
6 dispute has always been with the large amount of attorneys
7 fees which the plaintiff has claimed and just what
8 Mr. Chadwick said, that, yes, we spent a lot of time and money
9 on the case; but most of it was dedicated to defending the ADA
09:25:02AM 10 and the FMLA claims which the Court dismissed on summary
11 judgment. I mean, if you read the deposition, that's
12 90 percent of what he was questioned about in the deposition.
13 That's what most of the briefing and research was about.

14 THE COURT: Well, I've reviewed the report -- I
09:25:19AM 15 mean, the docket sheets -- I'm sorry. Not the docket sheets,
16 but the --

17 MS. MILLER: The invoices.

18 THE COURT: I'm sorry?

19 MS. MILLER: The invoices.

09:25:31AM 20 THE COURT: Yeah. That's a good word.

21 Lawyers prepare these hourly rate sheets and
22 invoices. I have reviewed those, and I'm not really sure that
23 much of this aggravation isn't a result of just having not
24 done it in the first instance. And I don't mean that as an
09:25:55AM 25 accusation of any sort, but I suspect that we were looking at

09:26:16AM

1 30 or -- about 35 or 40 thousand -- somewhere in the range of
2 \$40,000 in legal fees and \$8,000. So, we are looking at a
3 50,000-dollar matter, more or less, becoming a 100,000-dollar
4 matter because the Fifth Circuit said: She's entitled to
5 appellate fees because this appeal is not valid in the sense
6 of it raising valid issues.

09:26:37AM

7 And so, we have looked at something that has
8 grown as a result of not doing in the first place; and I'm not
9 sure that this isn't -- well, I'm absolutely sure this is a
10 self-inflicted wound; that is, you fall on your own sword --
11 not you, but the clients fall on their own swords by their
12 judgments. Well --

09:26:54AM

13 MR. SCHUELER: And, you know, as far as myself and
14 Wing Aviation, we've actually thought that there had been a
15 resolution based on the stipulation and that whether before or
16 after appeal --

09:27:10AM

09:27:30AM

17 THE COURT: But, see, don't you see counsel doesn't
18 want to get into another lawsuit with AIS and UTI? So, she
19 makes a deal; and she says: I will take 10,000 a month for
20 the next 10 months or whatever. And after the first or second
21 payment, counsel has a problem because he hasn't been paid.
22 And so, his priority would be his payment; and that is a
23 conflict with what his client has done. But the priority
24 takes second -- the priority takes a back seat -- priority to
25 pay Miller takes a back seat because there are other more

1 important things to do.

2 Now, how does she get her money? She comes
3 into court, and she brings either a lawsuit and creates
4 another 50,000-dollar bill on both sides of the issue. And
09:27:43AM 5 so, this thing just goes on and on. And I'm simply lamenting
6 the challenge here, the problem here, because it is not one
7 that -- that AIS or UTI apparently wants to have resolved
8 except, according to what they believe to be, I gather, their
9 financial ability based on whatever their condition might be.
09:28:12AM 10 And I gather what I am hearing now is they probably don't have
11 the ability to pay what they offered to pay her some time ago,
12 I mean recently.

13 So, are we not wasting our time -- and what I
14 mean by "time," I mean your time sheets by having you come in
09:28:27AM 15 and contest and argue these matters? Why is it that you at
16 UTI and AIS would challenge anything, rather spending more
17 money and more time running up another bill and having parties
18 come down? I think it is a little bit dismay.

19 Tell me why LLC has to be in this lawsuit. I
09:28:49AM 20 went through, Ms. Miller, what you presented to the Court; and
21 there is kind of a judicial shuffle here -- or a courthouse
22 shuffle, maybe I should say -- of course, it didn't happen at
23 the courthouse. I guess it happened in Austin -- where
24 Mr. Wing or whoever he is -- I'm not sure if it is Wing. I
09:29:11AM 25 guess the name of the gentleman is Wing -- can't really

1 think -- figure out how he wants to present himself, but it
2 looks as though what has happened is they just got confused
3 about who they were.

4 MS. MILLER: Well, that's a misidentification, Your
09:29:30AM Honor; and that goes -- would go under Rule 60(b), not 60(a).
5 And a misidentification under 60(b) has to be corrected within
6 one year. So, they are foreclosed from that correction. It
7 is also -- and I --

9 THE COURT: Even if, quote, that was the intent --
09:29:51AM 10 and I don't -- I'm not trying to put words in your mouth, but
11 even if the dismissal that occurred was intended -- whether by
12 the right name or the wrong name, intended by the party
13 this -- I believe at that time there was only one Wing
14 Aviation, whether it was Inc. or -- I think it was LLC because
09:30:13AM 15 the initial -- the first Wing Aviation, LLC, was created in
16 2001. It went out of business on June 24th, 2005. And then
17 in -- I don't know why it did it the way it did, but somehow
18 this Conroe versus Houston thing comes into play. So, on
19 June 24, Wing Aviation, LLC, rises up out of the dust again.
09:30:39AM 20 Apparently, it's -- is it the Delaware corporation at that
21 time?

22 MS. MILLER: We've sued the Delaware corporation,
23 Your Honor. And it is my habit -- and probably because I was
24 a corporate executive before I went to law school at 40. So,
09:30:51AM 25 I understand corporate structure; and I always look at it.

1 And I find it fascinating that the switches are constantly
2 played not just here but in any number of cases. I have
3 another one which was a very big switch.

4 So, I started -- we sued LLC Delaware because
09:31:10AM 5 that was the only Wing Aviation, LLC, in existence at the time
6 of the lawsuit.

7 THE COURT: Correct.

8 MS. MILLER: Okay. And researching it at the
9 Secretary of State, there were two Wing Aviation LLCs
09:31:25AM 10 established in Texas. Both of those are defunct.

11 THE COURT: And there was never a Wing Aviation,
12 Inc., that was a party to this suit.

13 MS. MILLER: Yes. Yes.

14 THE COURT: No, no, no.

09:31:37AM 15 MS. MILLER: Oh, never a party to this suit,
16 correct.

17 THE COURT: Yeah. Because I think what you provided
18 to me was June 28th of '01 that that company went out of
19 business and became something else, perhaps.

09:31:45AM 20 MS. MILLER: It went to John Wing Aviation and then
21 John B. Wing Aviation. Still, all of them doing business
22 under these assorted names; and that's why I can't abide by
23 this just being a typo, which is not the way that they have
24 indicated that they work.

09:32:05AM 25 THE COURT: Well, what we do know -- irrespective of

1 what plays out in your gut, as we say, what we do know is that
2 there was no Wing Aviation, Inc., in 2008 or 2009 when this
3 matter was being resolved. We know that.

4 MS. MILLER: It was a predecessor of an existing
09:32:28AM 5 company.

6 THE COURT: Right. Or at least on paper we know
7 that.

8 MS. MILLER: Correct.

9 THE COURT: I don't know what was going on in the
09:32:33AM 10 offices. But we know that by the -- it became inactive on
11 June 28th. And in that -- when this lawsuit was filed in
12 2007, in May of 2007, there was an existence -- two companies,
13 I gather. One was Wing Aviation, LLC; and the other was John
14 B. Wing Aviation, Inc., which I gather are still -- both
09:33:04AM 15 perhaps still in play.

16 MS. MILLER: That's the predecessor of Wing
17 Aviation, Inc., correct. The John B Wing --

18 THE COURT: John B. Wing.

19 MS. MILLER: Correct.

09:33:11AM 20 THE COURT: Yeah. But it is still in use. It was
21 still in use, according to the paperwork. And they were both
22 formed in the same year and the same month, back in March of
23 1993.

24 Let's go back now to the original problem. The
09:33:26AM 25 problem is that Wing Aviation, LLC, apparently was never an

1 employer for Timothy Gagnon. And I say "never an employer"
2 meaning even though they were sued and brought into the suit
3 and defended the lawsuit, I'm not really sure why that wasn't
4 the issue. And maybe that was raised at the very outset, that
09:33:55AM 5 we are not his employer, et cetera, et cetera. That probably
6 was a defense. It just could not get resolved in the
7 immediate.

8 The point is that if they were never the
9 employer, how do they now remain in this lawsuit? How would I
09:34:13AM 10 keep them in this lawsuit, even though what -- the way in
11 which they attempted to get out did not effectuate that?

12 MS. MILLER: Wing Aviation, LLC, was the employer.
13 Correct.

14 THE COURT: Well, that was the site. That was
09:34:25AM 15 certainly the place where Mr. Gagnon went to do his work.

16 MS. MILLER: Do you mean not the employer as to
17 AIS/UTI or not the employer as to Wing Aviation, Inc.?

18 THE COURT: Well, I'm sure Wing Aviation, Inc., has
19 anything to do with anything by 2007. At the time that
09:34:44AM 20 Mr. Gagnon was working, he wasn't -- couldn't have been
21 working for Wing Aviation, Inc., because it was no longer in
22 use as a company. John Wing Aviation was no longer in use.
23 All of these companies had become defunct except those two,
24 right?

09:35:03AM 25 MS. MILLER: Well, I don't know which two; but --

1 THE COURT: The two would be John B. Wing Aviation,
2 Inc. that was still in use in 2007 and Wing Aviation, LLC,
3 that was still in use.

09:35:20AM 4 MS. MILLER: Okay. When you say "in use," it's
5 still recognized as viable companies by the Secretary of
6 State.

7 THE COURT: Correct.

8 MS. MILLER: Whether or not the other entities that
9 were superseded were still used -- and they still are, for
09:35:32AM 10 example; and that's how Montgomery County is just an example.

11 Montgomery County has a lease with Wing Aviation, LLC, Texas;
12 but Wing Aviation, LLC, Texas -- either one of them -- there
13 are two of them, and neither one of them exist anymore.

14 So, it is a shuffle of entities of which we
09:35:53AM 15 view this as being another shuffle in an attempt to then
16 stream along -- get Wing Aviation in it, and then Wing
17 Aviation is an empty company. So, we can't collect against
18 Wing Aviation, Inc., either. But -- but it didn't work.

19 THE COURT: All right. I'm not really sure that
09:36:13AM 20 this issue has ever been resolved in a court of law except --

21 MS. MILLER: I don't believe it has.

22 THE COURT: -- the question of whether or not the
23 Court has the power and authority or should exercise the power
24 and authority, if it has it, to correct an error on the part
09:36:32AM 25 of the -- of part of Wing Aviation, Inc. In other words, are

1 you filing, as Ms. Miller would argue, under the wrong rule?
2 And if so, are you now asking me to do something technically
3 irresponsible on a second time around?

09:36:51AM 4 MR. SCHUELER: I don't think so, Judge. I mean, I
5 think the case falls clearly within Rule 60(a). I've cited
6 you, you know, a half a dozen cases.

7 THE COURT: Sure.

8 MR. SCHUELER: And clearly the Fifth Circuit is
9 saying the Court can -- and not only can, but the Court
09:37:04AM 10 should, almost a must -- correct typographical, clerical
11 errors in documents. So, even when we were over here,
12 everybody was talking about Wing Aviation, meaning Wing
13 Aviation, LLC, the -- one of the defendants in the court in
14 the case. Even Your Honor said: So, we are going to dismiss
09:37:24AM 15 Wing Aviation from this case. That was everybody's intent.

16 And, you know, it is my fault in the sense that
17 I am the attorney and responsible for the clerical errors of
18 my staff. The secretary that typed it put "Inc." instead of
19 "LLC." I didn't notice it. Honestly, none of the counsel
09:37:43AM 20 noticed it. The Court didn't notice it. Not that they would,
21 necessarily; but I'm just saying it was a basic clerical
22 mistake.

23 It's just what those cases say, that -- where
24 the Court can do what's called -- the Fifth Circuit calls a
09:37:59AM 25 judicial eraser. It's not that there -- there was no entity

1 at that time named Wing Aviation, Inc. So, it can't be a
2 misnomer for misidentification. The only two companies that
3 existed were Wing Aviation, LLC, which was the party to this
4 lawsuit, and John B. Wing Aviation, Inc.

09:38:17AM 5 I don't know exactly what the corporate
6 structure of the company is. I'm sure Ms. Miller, as a
7 corporate lawyer, would know; but -- I mean, I know from my
8 exposure to my corporate partners, there's lots of different
9 reasons why companies incorporate and change from a
09:38:34AM 10 corporation to an LLC. I don't know what the reasons were,
11 but I don't think there's anything nefarious about the fact
12 that they did that. It is operated as Wing Aviation, LLC,
13 from -- at least for all the time that's relevant to this
14 lawsuit. And but for this clerical typographical error, we
09:38:53AM 15 would not be here at all.

16 I mean, I will say the Fifth Circuit cases
17 under Rule 60(a) are, I think, very clear, very direct. And
18 what the Fifth Circuit is going to look to is what was the
19 intention of the Court. And I think there's no doubt that the
09:39:08AM 20 Court's intention was to dismiss Wing Aviation, LLC; and that
21 was the intention of the parties. And as I say, but for this
22 typographical error, there would be no issue. We wouldn't
23 even be here.

24 THE COURT: So, you disagree with Ms. Miller's
09:39:25AM 25 argument that we had a year to get this straightened out; and

1 failing that, it is too late for the Court to do anything.

2 You disagree with that, counsel?

3 MR. SCHUELER: Oh, I disagree with that. It is not
4 a 60(b) motion. It's clearly a 60(a), a clerical error -- I
09:39:42AM 5 mean, a clerical, typographical error. And, honestly, Your
6 Honor, I had no idea that it was an issue until I saw her
7 motion; and that's the first time that -- this motion a month
8 or two ago -- that anybody has raised the issue that, hey, you
9 misidentified or there was an error -- a typographical error
09:40:03AM 10 in the identification of the party. Even the certificate of
11 interested parties that she filed with the Fifth Circuit says
12 Wing Aviation, LLC, (Wing Aviation, Inc.). And then says
13 "voluntarily dismissed and then terminated by the Court."

14 So, I mean, even if you -- and, you know, I'm
09:40:22AM 15 not shown as an interested counsel in the Fifth Circuit. I
16 wasn't -- my client was not a party to the appeal. If I got a
17 copy of the brief, and I don't dispute that she might have
18 sent it to me -- she didn't send it to me in the basis that I
19 was counsel of record for an interested party. And all I'm
09:40:40AM 20 saying is I think that further demonstrates the understanding
21 that everybody connected with this case has had since December
22 of 2008 that Wing Aviation, the defendant in this case, was
23 dismissed; and once the Court entered a final judgment; that
24 dismissal became final.

09:40:55AM 25 THE COURT: All right. Ms. Miller, last word.

1 MS. MILLER: Thank you. Just a couple of issues.
2 One, Mr. Schueler indicates that nobody noticed. Well, we did
3 notice. We were -- at that point we weren't wanting to
4 dismiss anybody. We didn't want to. And it is not the
09:41:11AM 5 intention of the Court that governs here. It is the intention
6 of the parties. It was not our intention to dismiss Wing
7 anybody. And so, therefore, it is one of misidentification.
8 They are two entities, whether or not they are functioning
9 entities. They are two separate entities, and it is clearly a
09:41:34AM 10 question of misidentification, under which that would fall --
11 you know, it would fall under Rule 60(b) which demands a
12 one year correction of it.

13 Also, there's more case law -- and it is cited
14 probably ad nauseam in my brief -- that once the Court has to
09:41:52AM 15 go into pleadings and once the Court has to go into facts and
16 has to go into briefing by the parties, it clearly is not
17 something that is a clerical mistake under Rule 60(a). So, by
18 the very fact that we are here today arguing it, presenting
19 cases, that dispels any notion that it would fall under 60(a)
09:42:10AM 20 without a statute of limitations of one year.

21 THE COURT: Well, I think part of the reason you are
22 here arguing it is because of my concern as to whether or not
23 there was something that the Court missed in this discussion
24 and this dialogue that occurred. While I always have
09:42:29AM 25 reservations about dismissing a party in the face of a trial

09:42:54AM

1 and/or other proceedings, I rely upon the attorneys to make
2 that judgment call; and hopefully they can live by their
3 decisions. In this instance, the Court entered an order
4 presented to it without any concern that it was a correct or
5 incorrect party. It is not a matter of me making that
6 decision.

09:43:13AM

7 So, what I am going to do is go back now and
8 meditate upon these documents. I've read through them, and
9 now I'm going to look at some of the underlying cases to get a
10 sense of whether or not I'm making, let's say, an error in my
11 judgment in this matter; and then I will go ahead and make
12 some decision.

09:43:29AM

09:43:50AM

13 And let me just say as it relates to the
14 attorney's fees, there is -- you know, in my opinion, the best
15 evidence of whether or not a fee is reasonable is what another
16 party will spend to defend it. Now, the argument here being
17 made -- well, we defended. We put a lot of work into two
18 claims that did not go forward -- those claims that did not go
19 forward require the same evidence as the claim that did go
20 forward.

09:44:05AM

21 Now, while the summary judgment motions that
22 were filed by the parties might have required some additional
23 work on the part of the defense -- and certainly in response
24 on the part of the plaintiff -- if any carving were to be
25 done, it certainly has to be done as it relates to simply the

1 Motion for Summary Judgment because the claims are claims.
2 And we know how the pleading law is in this country; that is,
3 you plead as many claims as you need to plead and can plead
4 under those facts and under the circumstances. And it does
09:44:22AM 5 not burden the parties or the Court to carry those particular
6 pleadings. And, of course, the distinction here to be made,
7 as it relates to work, has to be and can be carved if there is
8 to be done.

9 So, there you have it. I mean, I can look at
09:44:40AM 10 Ms. Miller's time sheets and determine whether -- or how much
11 time she spent on responding to the Motion for Summary
12 Judgment; but that's the extent of any reduction, if any, that
13 should occur in this case. So, you get a sense of where I am
14 going with this matter.

09:44:58AM 15 Anything else, ladies and gentlemen?

16 MS. MILLER: One other issue, Your Honor.

17 THE COURT: Sure. Go ahead.

18 MS. MILLER: On the Wing Aviation issue, it would be
19 our position that that dismissal was improper because it
09:45:11AM 20 wasn't signed by the parties -- by all parties. And at that
21 point, we had an oral agreement; but it became apparent that
22 we didn't want to sign that dismissal. And, therefore, it
23 wasn't a legally appropriate dismissal, which we could have
24 appealed had it dismissed Wing, LLC. But since it didn't, we
09:45:32AM 25 didn't have the right or we didn't have the necessity to

1 appeal it at that point.

2 Wing is arguing now that because of their
3 mistake, we've lost that right to appeal if they are dismissed
4 from the suit, which -- you know, it is just kind of a
5 Catch-22 on that one.

6 THE COURT: All right. I think I have heard it and
7 more than once. So, I'm going to excuse you at this point;
8 and the Court will take this matter up and try to get a
9 judgment entered that won't be appealed.

09:46:06AM 10 Thank you very much. Have a good morning.

11 ALL COUNSEL: Thank you, Your Honor.

12 THE COURT: You may be excused.

13 (Proceedings concluded.)

14 * * *

15 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled cause, to the best
16 of my ability.

17

18 //s_____ CSR, RPR
Stephanie Kay Carlisle
19 Official Court Reporter

03/01/2011
Date

09:46:12AM 20

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